FILE COPY.

Supreme Court
FILED
OCT 12 1909
CLERK

No. 351.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1909.

ALICE A. OAKLE, Administratrix of the Estate of Herman D. Oakle, deceased,
Petitioner,
vs.
THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

REPLY BRIEF.

H. H. C. MILLER,
W. S. OPPENHEIM,
Solicitors for Petitioner.

THE SUNTHORP-WARREN PRINTING CO., 519 RANDOLPH ST., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

ALICE A. CABLE, Administratrix of the Estate of Herman D. Cable, deceased,
Petitioner,

vs.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,
Respondent.

REPLY BRIEF.

QUESTION OF JURISDICTION.

In discussing the jurisdiction of the court, counsel for respondent have quoted from 2 Pomeroy's Equity Jurisprudence, Sec. 912, by which it is shown that the English Chancery Courts take jurisdiction of every case of fraud, although courts of law have concurrent jurisdiction and can administer the same kind of relief.

Counsel evidently did not discover Sec. 914 of the same volume, where it is clearly laid down that the courts of the United States have no such jurisdiction and that the English

rule is not the law in this country. This eminent author says:

"Sec. 914. The American Doctrine.—In a few of the earlier decisions the English rule was adopted to its full extent. This, cannot, however, be regarded as the present American doctrine. As was shown in the former volume, in several of the states only a partial and very narrow equitable jurisdiction was for a long time conferred, and this was strictly limited by the courts to the very matters specified by the statutes. In other states, the equitable jurisdiction was defined by statute as embracing only those cases for which there was no adequate remedy at law. Influenced partly by the tendency of this legislation, and partly by the supposed constitutional guaranties of the jury trial, which were construed to forbid the interposition of equity in controversies which could be determined at law, the equity courts of the United States and of the several states have practically abandoned a large part of the jurisdiction in matters of fraud, which is confessedly held by the English Court of Chancery. The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain and complete. The language on this subject often used by judges, represents nearly the entire jurisdiction of equity in matters of fraud, whatever be the remedies granted, as concurrent with that at the law, and as not *existing* where adequate legal relief can be given. The inaccuracy of this mode of expression has been shown in the former volume. The true doctrine is that where the estate or interest is equitable, the jurisdiction exists and will always be exercised; where the estate, interest or right is legal, and the remedies are equitable, the jurisdiction always exists, but will not always be exercised where the right is legal and the remedy is pecuniary and legal, the jurisdiction is concurrent and only exists where the remedy at law is inadequate. I have placed in the foot note a number of recent decisions, arranged in groups according to the nature of their reliefs, merely as examples and illustrations of the doctrine adopted by the American courts."

It will thus be seen that the English decisions relied on in the opinion of the Court of Appeals, as well as by respondent here, are not authorities in the courts of the United States, the jurisdiction of the Federal courts being wholly dependent upon the Statutes and Constitution of the United States. Sec. 723 of the Revised Statutes denies the right of the court to take jurisdiction in cases where there is a plain, adequate and complete remedy at law.

It is further claimed that the United States Circuit Court should take jurisdiction in this cause for the reason that the state courts do not enforce the same rule of law as that which governs the Federal court and that the Federal rule is much more favorable to the respondent.

It is said under the Federal rule that McCabe, the agent of the insurance company, had no power or authority to waive the provisions of the application, that the policy was to go into effect "only upon payment of the first premium and delivery of the policy during my lifetime, sound health and insurable condition," but under the rule as enforced by the state courts, McCabe had the power to waive this provision. We agree with counsel that under the rule in the case of *Hancock Life Ins. Co.* v. *Schlink*, 175 Ill., 284, respondent is liable to petitioner for the amount of the policy, but deny that any different rule prevails in the Federal court. The rule laid down in the *Schlink* case is based upon a construction of Sec. 23 of the Life Insurance Statute of Illinois, set out in the appendix to respondent's brief.

The contention that Sec. 23 of the act entitled "An Act to organize and regulate the business of Life Insurance," refers only to "wildcat" companies is extremely strange. This act not only regulates the business of life insurance companies organized under the laws of the State of Illinois,

but also gives permission to foreign companies to do business in this state upon complying with certain conditions. It was under the provisions of this statute that appellee was licensed to do business in the State of Illinois. To say that the provision of this statute does not refer to foreign insurance companies, but only to such as are forbidden by the laws of the state to do business herein, is an impossible construction. "Wildcat" companies are forbidden by the criminal laws of the state from doing any business in the State of Illinois, and no court should presume that a legislature would enact a law declaring certain persons to be agents of a company when that company is excluded from transacting business in the state.

McCabe, it is conceded, was authorized by the company to deliver the policy and collect the premium, but it is claimed he was not authorized to waive any of the provisions of the policy. It is not a policy, however, until it is put in force and contract relations exist between the parties. "The restriction inserted in the policy upon the power of the agent to waive any condition, unless in a particular manner, as by indorsing the waiver on the policy, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premium with full knowledge of the actual situation. This doctrine has been applied to both general and other soliciting agents."

American and English Ency. of Law, 16 Vol., 949, 2 Ed.

In *Wood* v. *American Fire Insurance Co.*, 149 N. Y., 382, it is said:

"That general agents of an insurance company may waive stipulations and provisions contained in the policy with re-

spect to the conditions upon which it shall have inception and go into operation as a contract between the parties, by delivering it with knowledge of all the facts and receiving the premium, has long been settled. It is obviously just that a party to a written contract should be precluded from defeating it by inserting conditions and stipulations contained in it, which would prevent its inception and which he knew at the time he delivered it and accepted the benefits were contravened by the actual facts, that any statement of the reasons upon which the rule rests, is no longer necessary."

This doctrine is supported by decisions of the highest courts of Georgia, Kentucky, Michigan, Missouri, New York, Pennsylvania, South Carolina, Texas, West Virginia and Wisconsin.

But outside of this, the authority of the agent, McCabe, being controlled by the statute of the State of Illinois, the Federal court is bound to adopt the construction of such statute made by the Supreme Court of the state. It is not a question of general commercial law, but one of the power of the agent, McCabe, under Sec. 23 of the statute concerning life insurance companies. The Federal courts have invariably followed the construction of state statutes which the Supreme Court of the state has placed thereon. In *United Firemen's Ins. Co.* v. *Thomas*, 92 Fed., 127, it was declared that no decision had been rendered by the Supreme Court of the state upon a certain section of the Fire Insurance Company Act, and the Court of Appeals declined to follow certain *obiter* statements made in *Insurance Company* v. *Ruckman*, 127 Ill., 264.

Sec. 23 has been passed upon by the Supreme Court of Illinois in *John Hancock Mutual Life Insurance Company* v. *Schlink*, 175 Ill., 284, and it was deliberately held that a local agent had the power to waive a provision of a policy providing that it should be delivered only during the sound

health of the insured, and also that the same agent had the power to extend credit for the payment of the premium.

A late expression upon this subject is found in the case of *McMaster* v. *New York Life Ins. Co.*, 183 U. S., 25. The policy in that case had a provision similar to the present one, that no agent had power to change or modify the contract and that such power could only be exercised by certain principal officers of the company. The policy was dated December 18th, and delivered on December 26th, but provided that the next yearly premium should be paid upon the following 12th day of December. It is said by this court:

"So that, notwithstanding the premiums in this instance were not actually paid and received and the policy delivered until December 26th, it may be conceded that in accordance with the practice in such matters the contract of insurance commenced to run from December 18th, rather than from December 26th."

In the *McMaster* case the rule laid down in *Continental Life Ins. Co.* v. *Chamberlain*, 132 U. S., 304, is expressly followed and the principle again affirmed that the statute of the state may make a person an agent of an insurance company, although the company seeks by its policy to avoid such an effect and could do so were it not for the statute.

Sioux City v. *N. A. Trust Co.*, 173 U. S., 99.
New York Life Ins Co. v. *Cravens*, 178 U. S., 389.

The Merits.

We are by no means willing to concede the claim made by the respondent that in procuring insurance the applicant must disclose everything relating to his physical condition, whether such request is made in the application or not, and that subsequent to the application and before the delivery of

the policy, if any change has occurred in his condition, then such fact must be reported to the company, else the policy is obtained by fraud and is void. Upon the making of a truthful application and its acceptance by the company and the issuance of a policy thereon, a complete contract is made between the parties. The company insures the person from the time of the issuance or date of the policy and is paid for such insurance. His condition subsequent to that time is a matter which should in no manner affect the validity of the insurance. The company demands and exacts payment for insurance upon the life of the insured from the date of the issuance of the policy and the payment of the premium carries the contract from the date which is placed thereon by the company. If the insured was then a proper subject for insurance and had complied with all the conditions and provisions of the policy, the company cannot be heard to say that subsequent to that time and before delivery of the policy his condition had so changed as to vitiate the contract, although it had received payment for insurance upon his life for a time prior to the origin of such change. There is nothing in the policy of the law which forbids such a construction. The rule upon this subject is laid down in the case of *Mutual Benefit Life Ins. Co.* v. *Higinbotham*, 95 U. S., 380. There a policy of life insurance had lapsed and the insured, for the purpose of reinstatement, made a representation as to the state of his health on October 1st. The renewal receipt was not delivered until October 11th. Between those dates the condition of the applicant's health had changed and the insurance company defended the policy upon the ground that it was a fraud upon it for the insured to receive the renewal receipt on October 11th without disclosing his changed condition. This court, however, held that the company was bound, that the representations re-

ferred to October 1st and there was no duty upon the insured to make further statements concerning his condition at the time of the delivery of the renewal certificate. It is there said:

"We are of the opinion that the exceptions to the charge of the judge upon the theory that representations by Dr. Day were made on the 14th day of October, or that concealment was then practiced by him on the ground that the previous representations necessarily and as a matter of law were continuous, and that the contract was consummated on that day cannot be sustained. It was a question proper under all of the circumstances for the consideration of the jury. If they had found for the plaintiff, we are of the opinion that the verdict would not have been vacated as being without or against the evidence.

In many English cases a formal acceptance of the proposal for insurance is issued. In some companies its acceptance is unconditional, so that the premium be paid within the month, the letter of acceptance running to the effect that the proposal has been accepted and that a receipt is ready at the office for the premium, upon the payment of which the insurance will commence, but that if the same be not paid within thirty days a reappearance and fresh certificate will be required. In other companies the acceptance is qualified by the condition not only that the insurance shall not commence until the payment of the claim, but that no material change shall occur prior thereto.

Bunyon, 58, cited in Bliss, Sec. 99.

The practice is not uniform and there is nothing remarkable in allowing a certificate of health to stand good for thirty days, no reappearance or examination for that interval being required."

In the case at bar the insurance company issued its policy, dated February 6, 1899, and the payment of the premium for the year, continued the policy in effect until February 6, 1900. It was intended by the parties that the contract should begin upon that day and the company received payment for insurance from that time. If, therefore, the condition of the insured complied with all of the provisions

of the contract upon that day and the company received payment therefor, it is inequitable and unjust for it to claim that because the assured subsequently was not in an insurable condition therefore the policy was void and of no effect. Should it desire to have its contracts not go into effect until the premiums are paid and the policy delivered it should not exact payment of premiums for insurance prior to the time of the delivery of the policy. If it does so then the contract relates back to the time when the company itself has said the policy should go into effect.

It must be remembered that the provision providing that the policy "to be issued hereon shall take effect only upon the payment of the first premium and delivery of the policy during my lifetime, sound health and insurable condition" is contained in the application of Mr. Cable which was dated January 16, 1899. This proposition contemplated that Mr. Cable should receive insurance from the time for which he was to pay premiums to the insurance company. He did not intend, nor was it the understanding that the company was to receive payment for a certain time during which no insurance was to exist upon the life of the applicant. The company issued its policy upon this application and stated therein that the applicant is insured from the 6th day of February, 1899, and received payment of the premium provided for in the policy. The form of the application, as well as of the policy is drawn by the insurance company. Any question concerning its construction is decided in favor of the insured. When upon this application the insurance company issued its policy and said that it should be in force from and after the 6th day of February and received payment of the premium, is it not reasonable to construe the application and policy as meaning that in his application the assured agreed that his condition should not change up to

the time when the policy by its terms was to go into force? The company having set the 6th day of February as the time and the assured being without question a good risk at that time, and having paid the premium exacted by the company for insurance from that day, the policy under its terms should be in full force and effect notwithstanding Mr. Cable subsequently became sick.

The application signed by Mr. Cable which is dated January 16th, is an offer to the insurance company to pay it the sum of $848 per year upon the issuance to him of an insurance policy. When this proposition is accepted by the insurance company and the date of the policy is fixed as February 6, 1899, a complete contract is then made between the parties and all of the representations contained in the application refer to that date. When the insurance company issues its policy and forwards it to its agent for delivery, the insured would have the right to compel the delivery of the policy to him upon payment of the premium notwithstanding the agent might refuse to deliver the policy.

New York Life Ins. Co. v. *Babcock*, 104 Ga., 67.

Newark Machine Co. v. *Kenton Ins. Co.*, 50 Oh. St., 549.

When the proposition contained in the application is accepted by the company and its policy issued, it becomes a complete contract and from thenceforward the insured is entitled to the benefits of his contract.

Travis v. *Nederland Life Ins. Co.*, 104 Fed., 486; 43 C. C. A., 653.

Where the policy is dated as of a certain time, it goes into force as of that date, although the policy may not be delivered and the premium paid until a subsequent date.

In the McMaster case, *supra,* the policy was dated December 18th, but not delivered until December 26th when the premium was also paid, it is said:

"The truth is the policies were not in force until December 18th, and as the premiums were to be paid annually and were to be paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the 12th to the 18th."

Here is a distinct holding that the policies being dated at a certain time and the premiums paid for insurance from that time, although the policies were not delivered and the premiums paid until eight days later, the policies nevertheless were in force as of the date placed thereon by the insurance company. The insurance company having itself fixed this date as the time when the policy should begin to run if the insured met all of the conditions of his application at that time, it could in no manner affect the contract if thereafter his condition was changed. This being so, no possible fraud could arise in the procurement of the policy even had the insurance company not been notified in any manner of the sickness of Mr. Cable. When the proposition contained in the application is accepted by the insurance company and the time fixed in the policy when the same was to begin to run, the payment of the premium, causes it to take effect from that day.

Mutual L. Ins. Co. v. *Thomson,* 94 Ky., 253.
Yonge v. *Equitable L. Ins. Co.,* 30 Fed. Rep., 902.

Multiplicity of Suits.

Upon the question of multiplicity of suits urged by respondent, it is admitted by the bill of complaint that the commuted value of the policy is sued for and claimed by petitioner and not the several installments provided for in the policy. There is no contention that under the policy the beneficiary may not elect to receive the commuted value of $30,000 or to receive thirty several installments of $1,666.66 each, but it is said that the administratrix had no authority without direction of the Probate Court to elect to receive the commuted value, and that, therefore, her action in bringing suit for the commuted value is without authority. As sustaining this position, counsel cites Sections 82 and 84 of the Act Concerning Administration of Estates, of the State of Illinois, wherein it is provided that an executor or administrator may under an order of court compound or sell a desperate claim and may also under the order of the County Court compound or sell claims which fall due at a period so remote as to prevent their collection within the time required for final settlement of the estate, which last claims shall not be sold or compounded at less than 10 per cent. below the value thereof. There is no other provision of the state statutes restraining or curbing the authority of executors or administrators as to their powers concerning the collection of debts due the estate.

The suit brought by the petitioner is not for a desperate claim, nor is she endeavoring to compound or sell the same and consequently it does not fall within the provisions of the statutes cited by respondent. Her authority is that which is given to her under the common law, and by the common law she has complete authority to act concerning the claim as if it were her own property. She had the

right to arbitrate, to release, settle or compromise the claim without any order whatsoever from the court, only subject, however, to answer to the estate for the value of the claim, should she act in bad faith. And this is the law of Illinois, as settled by the case of *Short* v. *Johnson*, 25 Ill., 489. There is no necessity for an order of the Probate Court directing the administratrix to sue for the commuted value, but if such were the fact there would be no difficulty in procuring such an order which would ratify all acts done by her in that respect. The possibility of the abandonment of the suit now pending and the institution of new suits for the several installments as they would have fallen due is a very remote contingency which would hardly warrant a court of equity in issuing an injunction against such a possibility. Having elected to take the commuted value, we are bound by such election.

As to the possible loss of the proofs of fraud in the death of the witnesses, Lord and McCabe, such possibility arises in every law suit which is instituted in the courts of the State of Illinois, and if such a contingency is a ground for the bringing of a bill in equity, every case instituted would give the right to such a bill.

Respectfully submitted.

H. H. C. Miller,
W. S. Oppenheim,
Solicitors for Petitioner.